Supreme Court, U.S.
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No. 97-1016

In The

Supreme Court of the United States

October Term, 1997

RICHARD C. REMUS, TRUSTEE FOR SUPERIOR METAL SHREDDERS, INC.,

Petitioner,

vs.

CITY OF KALAMAZOO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Did the District Court and the United States Sixth Circuit Court of Appeals follow the prior decisions of this Court and correctly apply the full faith and credit provisions of 28 U.S.C. § 1738 to a prior decision entered by a state court?

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STATEMENT OF THE CASE

The petition which has been filed in this matter seeks the review by this Court of the Sixth Circuit's opinion affirming the granting of the City of Kalamazoo's motion for summary judgment and the dismissal of the Petitioner's claims by the District Court. The petition contends that both the District Court and the Sixth Circuit erroneously applied the full faith and credit provisions of 28 U.S.C. § 1738 to a prior state court decision.

As set forth below, there is no basis for this Court to review the factbound contentions set forth in this petition, which have previously been rejected by the United States District Court and the Sixth Circuit Court, as well as the state courts of Michigan.

On July 26, 1995, Petitioner filed the underlying action in this matter in the United States District Court for the Western District of Michigan. The complaint which was filed in this matter by the Petitioner alleged a constitutionally improper "taking" had occurred during the period between 1980, when the City of Kalamazoo had initially revoked the license of Superior Metal Shredders, Inc. (thereby effectively preventing its operation of an automobile shredder generally considered to be a nuisance), and October, 1984, when the Kalamazoo County Circuit Court finally granted the City's request for a permanent injunction against operation of the shredder.[1] The takings claims raised by Petitioner's complaint in this action were essentially identical to those which had been raised by the Petitioner against the City in the action which had been

1. The City initiated legal action against Superior in December, 1980, seeking to enjoin it from operating without a license, in violation of City ordinances, and to abate its operation of the shredder as a public nuisance. Pet. App. A15.

filed in Kalamazoo County Circuit Court in 1989.[2] That suit had been dismissed with prejudice in July, 1990, on the basis of res judicata, because it was determined that the takings claims alleged in that case were essentially the same as the claims alleged in a counterclaim which had been filed by Superior in the 1980 action in Kalamazoo County Circuit Court.[3]

On August 15, 1996, the United States District Court granted a motion for summary judgment filed by the City of Kalamazoo on the basis that the Petitioner's claims of a taking were barred by the doctrine of res judicata, and dismissed the Petitioner's complaint. Pet. App. A14.

The Sixth Circuit affirmed that decision on September 30, 1997, and held that (1) the doctrine of res judicata applies to claims based upon 42 U.S.C. § 1983 which were previously litigated in state court; (2) under Michigan law, res judicata, or claim preclusion, prevents a plaintiff from litigating a claim that was actually litigated, or could have been litigated, in an earlier proceeding; (3) the District Court properly gave full faith and credit to the decision of the state court to dismiss Petitioner's 1989 state court action on principles of res judicata; and (4) the

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2. Petitioner's complaint in this action was identical to the complaint filed by Petitioner against the City in Kalamazoo County Circuit Court in 1989, with only the addition of subparagraphs A-K to paragraph 3 of the 1989 complaint. Both complaints asserted state and federal takings claims against the City as a result of its efforts to enforce its ordinances, and to abate operation of the shredder as a public nuisance. Pet. App. A8-9

3. In 1984, the Kalamazoo County Circuit Court had dismissed Petitioner's counter-claim with prejudice, when it granted the City's request for a permanent injunction against operations of the shredder. That decision was not appealed. Pet. App. A15.

Petitioner could not collaterally attack the state court decision which had been entered in 1990, and affirmed by the Michigan Court of Appeals in 1992. Pet. App. A7-10.

A. The petition fails to describe the underlying facts which led to entry of a permanent injunction in the state court action in 1984, which thereafter prohibited Superior from any further operation of the shredder.

The petition which was filed in this matter erroneously describes the events which occurred between 1979 and 1984 as if Superior was an innocent victim of the City's over zealous efforts to prevent it from doing business as a recycling dealer. The petition conveniently omits the extent of the nuisances created by the shredder during that time period and ignores the fact that the shredder was frequently operated by Superior in violation of the City ordinance, and in violation of the orders of the Kalamazoo County Circuit court, which had maintained jurisdiction of the matter during that four year period.

Soon after Superior commenced operation of the shredder, the City began to receive complaints from neighbors and citizen groups concerning the excessive vibration, explosions, noise and pollution which emanated from the shredder. In response to those complaints, the City amended City Ordinance 24-20 to provide that:

> a recycling dealer's business shall be so conducted as not to create a nuisance by reason of noise, odors, smoke, fumes, vibration or any other reason or condition.

JA 9, 10, 63.[4]

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4. References to "JA" refer to pages of the joint appendix in the Sixth Circuit not included in the petitioner's appendix.

Following additional explosions at Superior in March of 1980, the City held license revocation hearings in April, May and July of 1980. On August 13, 1980, Superior's license was renewed, but was conditioned upon continued operation of the shredder in compliance with operational restrictions which had been recommended by a neutral hearing officer in order to prevent future explosions and reduce vibration levels. Superior failed to comply with the restrictions imposed upon its license. Explosions occurred at the shredder on September 4, 1980, September 15, 1980 and December 4, 1980. Following a hearing held on December 8, 1980, Superior's license was revoked on December 16, 1980.

On December 17, 1980, the City filed an action in Kalamazoo County Circuit Court to enjoin Superior from operating the shredder without a license and to abate a nuisance. On December 19, 1980, Kalamazoo County Circuit Judge Robert Borsos held an evidentiary hearing and then granted the City's request for a temporary restraining order against Superior.

On January 8, 1981, Judge Borsos lifted the temporary restraining order and conditioned any further operation of the shredder on the compliance with the same operating restrictions which had been recommended by the hearing officer in August, 1980.[5] Complaints by nearby residents continued, however, and on June 3, 1981, Judge Borsos again ordered Superior to cease operating the shredder pending the results of further vibration tests and proof that the shredder was not producing excessive vibration levels.

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5. Superior operated without a recycling dealers license from January 8, 1981, until the permanent injunction was entered in October, 1984. Its operation for this period was only with, or without, the permission of the Kalamazoo County Circuit Court. JA 11-15

ordered restrictions, and the continuing and ongoing complaints by residents in the community, which eventually resulted in the permanent injunction being entered by the Kalamazoo County Circuit Court against any further operation of the shredder by Superior, in October, 1984.

B. The petition does not adequately describe the constitutional claims asserted by Superior in the counterclaim which it filed in the first state court action in 1980, or the final disposition of those claims in 1984.

The petition's single sentence description of the counterclaim filed by Superior in the state court action in 1980 (Pet. p. 6) fails to adequately describe the constitutional claims which were presented by Superior in that action.[6]

The fact that Superior had, in essence, alleged a "taking" in violation of the United States and Michigan Constitutions was not lost on Judge Schma at the time he dismissed the state and federal takings claims on grounds of res judicata in the second state court action. JA 330.

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6. Paragraphs 7 and 8 of the counterclaim of Superior dated December 23, 1980, stated as follows:

> 7. That at said hearing Counter-Defendant unreasonably, arbitrarily and without any pretense of due process as that term is defined by Michigan and Federal Case Law revoked said license.
>
> 8. That this revocation is arbitrary, unjust, unreasonable and devoid of any reasonable relation to any objects or purposes which might be sought to be accomplished by said ordinance and is void and of no effect and violative of the Constitution of the State of Michigan and the Constitution of the United States of America and the Fourteenth Amendment thereto.

The Court should also be aware that at the time of the entry of the permanent injunction against Superior in 1984, the Order of the Kalamazoo County Circuit Court also provided that:

> IT IS FURTHER ORDERED that this case of action, including all claims, appeals, counter-claims and affirmative defenses, whether based on Federal, Constitutional or statutory law, civil rights or otherwise shall be, and is hereby dismissed with prejudice.

JA 177.

REASONS FOR DENYING THE WRIT

The petition's claim that the District Court and the Sixth Circuit improperly applied the full faith and credit provision under 28 U.S.C. § 1738 does not merit review by this court because the law is well settled. The decisions below correctly applied prior decisions of this Court to the unusual facts of this case, the law is well settled, and no conflict among any of the circuits has been alleged by the petition.

1. The law is well settled that 28 U.S.C. § 1738 requires a federal court to give the same preclusion effect to a state court decision as would the state where the judgment is rendered. *Migra v. Warren City School District*, 465 U.S. 75, 80, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984); *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 466, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982); *Allen v. McCurry*, 449 U.S. 90, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980). In *Migra, supra*, this Court held that 28 U.S.C. § 1738 precludes the bringing of a complaint under 42 U.S.C. § 1983 in District Court, where the claims could have been raised in prior state court litigation between the same parties. In that decision this Court further

held that the District Court is the proper court to interpret and apply state law regarding preclusion of claims. *See also Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379, 84 L. Ed. 2d 274, 105 S. Ct. 1327 (1985).

2. The District Court and the Sixth Circuit correctly applied the settled law which has been developed by this Court, *vis a vis*, full faith and credit, to the unusual factual circumstances of this case. Their decision correctly recognized that under Michigan law, a Plaintiff is precluded from litigating a claim that actually was litigated, or which could have been litigated, in an earlier proceeding between the same parties. *Eliason Corporation v. Bureau of Safety and Regulation of Michigan Department of Labor,* 564 F. Supp. 1298 (W.D. Mich. 1983); *Jones v. State Farm Insurance Company*, 202 Mich. App. 393, 401, 509 N.W. 2d 829 (1993).

The lower courts correctly determined that Petitioner's 1989 state court action included claims of taking under state and federal law, while noting as mentioned in footnote 3 of this brief, that the Petitioner's complaint filed in state court in 1989 was essentially identical to the Petitioner's complaint which was before them in this action, and that both complaints were based upon the same contentions of city regulation as had been raised in the first state court action in 1980.

3. The crux of the argument set forth in the petition is that the state court decision rendered in 1990 was wrong, and therefore the lower courts should not have applied the full faith and credit provision to that decision. However, the lower courts in this matter properly applied the full faith and credit provision to the state court decision, even assuming, arguendo, that the state court had made the wrong decision.

This Court has ruled that federal district courts, being courts of original jurisdiction, have no authority to review final determinations of a state court. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983). This is true even when the challenge to the state court decision involves a federal constitutional issue. *Feldman*, 460 U.S. at 482-486, 75 L. Ed. 2d at 222-225.

It is evident from the complaint filed in this action, which is essentially identical to the complaint filed in the 1989 state court action, that Plaintiff was seeking to review, by reasserting the same claim, what had already been decided and appealed through the state court system. This Court, in *Feldman* has made it clear that if such a review was to be undertaken, it could *only* have been undertaken by the United States Supreme Court in a timely manner, following the conclusion of the appeal process in state court in 1992.[7]

4. The petition's claims that the state court in the 1989 state court action did not have subject matter jurisdiction of the federal taking claim is also an improper attempt to collaterally attack that decision. Michigan law provides that error in the determination of questions of law or fact, upon which a court's jurisdiction depends, is error in the exercise of that jurisdiction which can only be challenged on direct appeal. *In re Hatcher*, 443 Mich. 426, 439, 505 N.W. 2d 834 (1993);

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7. Following the denial of leave to appeal by the Michigan Supreme Court in 1992, Petitioner filed, but failed to perfect, a petition for a writ of certiorari. The question stated in that petition was: "Whether an alleged 'taking claim' inverse condemnation under the Michigan Constitution, Article X, Section 2, and the United States Constitution, Amendment V, the State Courts can ignore the applicable state law and the federal law to deny the Petitioner his due process and equal protection rights to his day in court under the state theory of '*res judicata*.' " JA 337-339.

Jackson City Bank & Trust Co. v. Fredrick, 271 Mich. 538, 545-546, 260 N.W. 908 (1935).

Thus, it is appears that the lower courts in this matter were correct in applying the full faith and credit provisions of 28 U.S.C. § 1738 to the prior decision of the Michigan court in 1990.

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

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